

**THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

| | | |
|--------------------|---|------------------|
| STATE OF DELAWARE, |) | |
| |) | |
| v. |) | ID#: 0701020769 |
| |) | IN-07-02-0706-R1 |
| MARSHALL WEST, |) | |
| Defendant. |) | |

Submitted: October 22, 2008
Decided: January 12, 2009

ORDER

Upon Defendant's First Motion for Postconviction Relief – *DENIED*

1. On July 31, 2007, Defendant pleaded guilty to one count of Trademark Counterfeiting. Defendant was sentenced as a habitual offender¹ on September 24, 2007, to two years at Level V, suspended after one year for Level III supervision. Because sentences under 11 *Del. C.* § 4214(a) are not subject to suspension, the court resentenced Defendant on November 1, 2007 to one year at Level V, followed by six months Level III supervision.²

2. Defendant did not file a direct appeal from his plea and sentencing. Instead, Defendant filed his first motion for postconviction relief on July 30, 2008.

¹ 11 *Del. C.* § 4214(a).

² See 11 *Del. C.* § 4204(l) (requiring at least six months transitional period following one or more years at Level V).

The motion was timely and properly referred for preliminary review.³ Upon preliminary review, and to not hazard another confession of error,⁴ the court ordered the State to respond.

3. On September 22, 2008, the State responded that Defendant's motion was procedurally barred under Superior Court Criminal Rule 61(i)(3) and generally lacked merit. Defendant failed to file a reply.

4. Defendant's motion presents four grounds for relief. First, Defendant claims he was unaware he was subject to sentencing as a habitual offender. Second, Defendant claims ineffective assistance of counsel for Defendant's decision to accept a plea agreement and, third, for counsel's failure to file a discovery motion. Finally, Defendant claims the sentencing judge commented about photographic evidence that Defendant never received.

5. Before the court may consider the merits of a Rule 61 motion, it must address the procedural bars enumerated in Rule 61(i).⁵ A Rule 61 motion that

³ Super. Ct. Crim. R. 61(d).

⁴ See, e.g., *Webb v. State*, 888 A.2d 233 (Del. 2005) (TABLE) (ORDER) (Attorney General refuses to argue on appeal that violation of Rule 61(d)(1) harmless where motion filed seven years after conviction and Rule 61(i)(1) bar obviously applicable); *Floyd v. State*, 907 A.2d 145 (Del. 2006) (TABLE) (ORDER) (Attorney General refuses to argue on appeal that court may correct untimely appeal problem through Rule 61, notwithstanding *Middlebrook v. State*, 815 A.2d 739, 743 (Del. 2003)).

⁵ See Super. Ct. Crim. R. 61(i); *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

cannot overcome the procedural bars, absent an exception, must be denied.⁶

6. Rule 61(i) enumerates four procedural bars: (1) the motion was not filed within one year after final conviction, (2) the grounds for relief were not previously asserted in a postconviction hearing, (3) the grounds for relief were not presented during trial or on direct appeal, and (4) the grounds for relief have been formerly adjudicated in a previous proceeding. Under Rule 61(i)(5), the bars of Rule 61(i)(1)-(3) will not apply if a defendant presents “a claim that the court lacked jurisdiction or to a colorable claim that there was a miscarriage of justice.” Further, a defendant can avoid the Rule 61(i)(3) procedural default by showing cause for relief from the procedural bar, and prejudice from a violation of rights.⁷

7. Apart from ineffective assistance of counsel, Defendant’s claims are procedurally barred under 61(i)(3) for failure to present them on direct appeal. Further, Defendant fails to show cause and prejudice in order to overcome the bar.

8. Claims of ineffective assistance, in some instances, are enough to vault Rule 61's procedural bars. Defendant, however, waived his rights when he knowingly, voluntarily and intelligently plead guilty. In fact, the court recalls it warned Defendant that once he pleaded guilty, it would be almost impossible for him to back out of the plea later.

⁶ See *Flamer v. State*, 585 A.2d 736, 745 (Del. 1990).

⁷ Super. Ct. Crim. R. 61(i)(3)(A)-(B).

9. The Delaware Supreme Court recently reiterated “that a voluntary guilty plea constitutes a waiver of any alleged errors or defects occurring prior to the entry of the plea.”⁸ Because Defendant’s ineffective assistance of counsel claims address matters before to the plea, those claims are waived.

For the foregoing reasons, Defendant’s first motion for postconviction relief is **DENIED**.

IT IS SO ORDERED.

/s/ Fred S. Silverman

Judge

cc: Prothonotary
Steven Wood, Deputy Attorney General
Marshall West

⁸ *Johnson v. State*, 2008 WL 4830853 (Del. Nov. 7, 2008).